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In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5919

JOHN CVITKOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

Brief of Appellant

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STATEMENT OF THE CASE

The appellant was charged, by indictment, with several violations of the National Prohibition Act, the indictment containing six counts. The first count charged possession of Four (4) ounces of whisky on August 11, 1928.

The second charged possession of One (1) pint of whisky on August 11, 1928.

The third charged a previous conviction of the appellant on February 28, 1928, for possession of intoxicating liquor in violation of the National Prohibition Act.

The fourth charged the sale of Two (2) ounces of whisky on the 13th day of August, 1928.

The fifth charged previous conviction of the appellant on February 28, 1929, for the sale of intoxicating liquor in violation of the National Prohibition Act.

The sixth charged the maintenance, by the appellant, of a common nuisance at 520 Jackson Street, in the City of Seattle.

(Transcript, pages 2 to 6.)

On the trial the appellee produced a witness named H. E. Daggett, who testified that he was a Federal Prohibition Officer and that on the 11th day of August, 1928, he visited the premises at 520 Jackson Street, in the City of Seattle, which is a pool hall and soft drink place, and inquired of one John Kuchin if he could get a drink of whisky, and, being answered in the affirmative, purchased two drinks of whisky, one for himself and one for a friend who accompanied him. That later

in the afternoon of the same day he returned alone and met the appellant and purchased a drink of whisky from him and that on the 13th day of August, 1928, he purchased another drink of whisky from the appellant at the same place.

As a part of the Government's case in chief, it was stipulated in open court, by the attorneys for the respective parties, that the appellant had been previously convicted of possession and sale of intoxicating liquor in violation of the National Prohibition Act and was the same person referred to in Counts Three (III) and Five (V) of the indictment.

(Transcript, pages 19 and 20.)

The appellant was introduced as a witness in his own behalf and testified that he had never, at any time, sold any intoxicating liquor to the witness Daggett and that the first time he had ever seen the witness was when he was placed upon the witness stand as a witness for the Government. That he was arrested on Thanksgiving evening, 1928, at 520 Jackson Street, in the City of Seattle, and that at the time of the arrest no liquor was found upon the premises, although a search was made by the arresting officers, and it was not claimed that he was then guilty of any violation of the National Prohibition Act. That the arresting officers

were Federal Prohibition Officers Whitney and Corvin and at the time of the arrest it was suggested by Whitney to Corvin, in the presence and hearing of the witness, that the Government had no case against the appellant, to which Corvin responded that he intended to make one. This testimony was objected to by the attorney for appellee and the objection sustained, and an exception allowed. Thereupon, the attorney for appellant offered to prove these facts but the offer was rejected and an exception allowed, the trial judge stating that the evidence was not admissible because Corvin had not been called as a witness by the Government.

On cross-examination the appellant testified that he had no interest in the premises known as 520 Jackson Street or in the business conducted there and was present there at the time of his arrest temporarily while the owner was absent on an errand, and that while he had worked there occasionally in the past, he was unable to state whether he had worked there at any time during the month of August, 1928.

(Transcript, pages 21 and 22.)

After being instructed by the court on the law applicable to the case, the jury retired and thereafter returned a verdict finding the appellant guilty on all six counts of the indictment.

(Transcript, page 7.)

A motion for a new trial was interposed on behalf of the appellant and denied. In support of this motion an affidavit of the appellant was submitted to the court. In this affidavit the appellant set forth that he was arrested on the evening of November 27, 1928, at 520 Jackson Street, in the City of Seattle, by Federal Prohibition Officers Whitney and Corvin; that at the time of his arrest he did not have possession of any intoxicating liquor and Whitney remarked to Corvin that they had no case against him, and in response to that remark Corvin said, "Hell, I'll make a case against him," and that if permitted to testify he would testify to this conversation between the arresting officers and could produce a witness who also overheard the said conversation.

(Transcript, pages 9 and 10.)

At the time of the presentation of the motion for a new trial a stipulation in writing, entered into by the attorneys for the respective parties, was submitted to the trial judge reciting that while the appellant was a witness in his own behalf a question was propounded to him by his attorney which called for a conversation in his presence between Federal Prohibition Officer Whitney and Federal Prohibition Officer Corvin as to

what was said at the time of the arrest and that the court objected and refused to permit the witness to answer.

(Transcript, page 12.)

Thereafter the appellant was sentenced to pay a fine of Two Hundred Fifty Dollars ($250.00) and serve a period of four months in the county jail of Jefferson County, State of Washington.

(Transcript, page 8.)

From this judgment and sentence this appeal was taken.

ASSIGNMENT OF ERRORS

I.

That the District Court erred in refusing to permit the appellant to testify to the conversation between Federal Prohibition Officers Whitney and Corvin at the time of his arrest.

II.

The District Court erred in denying the appellant's motion for a new trial.

III.

The District Court erred in imposing sentence upon the appellant.

ARGUMENT

The sole question raised by this appeal is whether the appellant was entitled to introduce as original evidence, testimony tending to prove that the arresting officers, who were conceded to be prohibition agents of the United States, stated in the presence and hearing of the appellant and another person that the Government had no case against him for a violation of the National Prohibition Act, but that they intended to fabricate one.

The view entertained and expressed by the trial judge at the time of rejecting this testimony was that if Corvin had been called as a witness for the Government the questions could be propounded to him for the purpose of impeachment, but inasmuch as he had not been called as a witness the testimony was not available to the appellant as original evidence. In this the trial court was in error and the error was a prejudicial one in that it prevented the appellant having a fair trial.

As we view it, the evidence offered was admissible on two distinct grounds. In the first place, Whitney and Corvin were official agents of the appellee and all that they did or said in connection with the appellant's arrest and connected therewith was admissible as original evidence against the appellee.

The rule is clearly stated in 2 Whigmore on Evidence, Section 1078, as follows:

> "He who sets another person to do an act in his stead, as agent, is chargeable by such acts as are done under that authority, and so too, properly enough, is affected by admissions made by the agent in the course of exercising that authority."

It is quite generally held by the authorities that a prosecuting witness in a criminal case cannot make admissions which will be binding upon the state, but these holdings are based on the reason that there is no privity or legal entity between the prosecuting witness and the state in a criminal prosecution. This reason has no application to the present situation. Whitney and Corvin were official prohibition agents empowered by the Government, which could act only through its authorized officials, with the enforcement of the National Prohibition Act and in the discharge of their duties, their acts, statements and declarations became the acts, statements, and declarations of the Government itself.

In the second place, the evidence rejected by the trial court was admissible as a part of the *res jestae* of the arrest. All declarations and acts of parties to a given transaction, which are contemporaneous with and accompany it and are calculated to throw light upon the motives and intentions of the parties to it, are admissible as parts of the *res jestae.*

People vs. Mulvaney, 286 Ill. 114, 121 N. E. Rep. 229;

Fisk vs. U. S., 279 Fed. Rep. 17;

Nalls vs. State, 95 Southern Rep. 591 (Ala.);

Goff vs. State, 77 Southern Rep. 877 (Fla.).

The general rule is clearly stated in *People vs. Mulvaney,* supra, as follows:

> "Whenever it becomes important to show, upon the trial of a cause, the occurrence of any fact or event, it is competent and proper also to show any accompanying act, declaration or exclamation which relates to or is explanatory of such fact or event. Such acts, declarations or exclamations, are known to the law as *res jestae.*"

Apply this well-established rule of law to the present case. It was important to show the fact of the appellant's arrest for a violation of the National Prohibition Act and this was done by the Government, together with the time, place, and the officials by whom that arrest was made. Consequently, it was competent and proper for the appellant to prove, as original evidence, any statement or declaration accompanying his arrest which related thereto and was explanatory of that fact or event.

The case of *Nalls vs. State,* supra, presented a situation almost identical with the instant case. There the arresting officers undertook a search of the defend-

ant's premises, and were annoyed by his attitude and, although having no legal ground therefor, placed him under arrest. In answer to a question from the defendant's wife as to why they had placed him under arrest, one of the arresting officers said, "We have no case against him but I'm going to send him to the rockpile for objecting to the search."

On the trial this evidence was offered and rejected by the trial judge, as in this case. On appeal the Supreme Court of Alabama held that the statement of the arresting officer made at the time of the arrest and in connection therewith, were admissible as part of the *res jestae.*

If it was important to show the arrest of the appellant in the present case it was equally important and competent to show anything that was said or done, either by the appellant or by the arresting officers of the Government in connection therewith, and the refusal of the trial judge to permit the introduction of the testimony offered resulted in a verdict adverse to the appellant. It is fair to assume that if the testimony tendered had been admitted the jury would have promptly acquitted the appellant on all counts of the indictment.

The possession and sale charged against appellant occurred on August 11 and August 13, 1928. No arrest was made at that time or within a reasonable time thereafter. Months later Agents Whitney and Corvin visited the premises known as 520 Jackson Street, and, finding no liquor as a result of their search, and no violation of the National Prohibition Act, placed the appellant under arrest. With the evidence in this state the jury would have promptly acquitted, if they had known of the conversation between Whitney and Corvin at the time of the arrest. Even the previous convictions of the appellant, which he admitted in open court, would not have been sufficient to overcome the evidence of a deliberately fabricated case of law violation.

We respectfully submit that this case should be reversed and a new trial ordered.

FRED C. BROWN,

Attorney for Appellant.